



Via Overnight Mail and Electronic Mail

January 31, 2006

Mary L. Cottrell, Secretary
Department of Telecommunications and Energy
One South Station
Boston, MA 02110

Re: Verizon Arbitration, D.T.E. 04-33

Dear Ms. Cottrell:

The Supplemental Brief of the Competitive Carrier Coalition¹, the Competitive Carrier Group², and Conversent Communications of Massachusetts, Inc. (collectively, the "CLEC Parties") is enclosed for filing. This Supplemental brief is intended to substitute for part V.C (pp. 18-21) of the CLEC Parties' brief dated January 17, 2006. Verizon Massachusetts ("Verizon") has consented to and Hearing Officer Chin has granted permission for this filing.

The justification for this supplemental brief is that Verizon's proposed section 3.6.2.3.1 of the conforming amendment filed on January 17, 2006 contains language different from that which Verizon had proposed earlier in the negotiations among the parties. Verizon did not red-line the change or otherwise call it to the CLEC Parties' attention. The CLEC Parties were unaware of the change, and the discussion of Verizon's proposed § 3.6.2.3.1 in part V.C of our brief concerned the earlier version of Verizon's proposal. This substitute part V.C reflects the provision that Verizon actually filed.

¹ The following members of the Competitive Carrier Coalition join this supplemental brief: RCN-BecoCom LLC; RCN Telcom Services of Massachusetts, Inc., and DSLNet Communications, Inc. Although the Department found that DSLnet's interconnection agreement did not need to be amended to implement the *TRO* and *TRRO* (Arbitration Order at 12, n.1 & 35; Reconsideration Order at 44 n.16), DSLnet supports this amendment to the extent its rights under its existing interconnection agreement are not waived. *See* Proposed Amendment, § 4.4.

² The following members of the Competitive Carrier Group are parties to this supplemental brief: A.R.C. Networks Inc. d/b/a InfoHighway Communications, DIECA Communications, Inc. d/b/a Covad Communications Company, and XO Communications Services, Inc. (formerly Allegiance Telecom of Massachusetts, Inc. and XO Massachusetts, Inc.).

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Thank you. Please contact me (401-834-3326 direct dial or gkennan@conversent.com) if you have any questions.

Very truly yours,



Gregory M. Kennan
Director, Regulatory Affairs and Counsel

Cc: Service List

Enclosure

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

**Petition of Verizon New England Inc. for
Arbitration of an Amendment To
Interconnection Agreements with Competitive
Local Exchange Carriers and Commercial
Mobile Radio Service Providers in
Massachusetts Pursuant to Section 252 of
the Communications Act of 1934, as
Amended, and the *Triennial Review Order***

D.T.E. 04-33

**SUPPLEMENTAL
BRIEF OF THE COMPETITIVE CARRIER COALITION, THE COMPETITIVE
CARRIER GROUP, AND CONVERSENT ON REMAINING ARBITRATION ISSUES**

Introduction

The Competitive Carrier Coalition¹, the Competitive Carrier Group², and Conversent Communications of Massachusetts, Inc. (collectively, the “CLEC Parties”) submit this supplemental brief, the purpose of which is to substitute the material below for part V.C (pp. 18-21) of the CLEC Parties’ brief dated January 17, 2006. Verizon has consented to and Hearing Officer Chin has granted permission for this filing.

The justification for this supplemental brief is that Verizon’s proposed section 3.6.2.3.1 of the conforming amendment filed on January 17, 2006 contains language different from that which Verizon had proposed earlier in the negotiations among the parties. Verizon did not red-

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line the change or otherwise call it to the CLEC Parties' attention. The CLEC Parties were unaware of the change, and the discussion of Verizon's proposed § 3.6.2.3.1 in part V.C of our brief concerned the earlier version of Verizon's proposal. This substitute part V.C reflects the provision that Verizon actually filed.

Section 3.6.2.3, as it appears in the January 17 compliance filing, reads as follows (CLEC Parties' proposed language is in ***bold, italicized and underline***, and Verizon's proposed language in **bold**³):

3.6.2.3 [To the extent it is determined that Verizon is entitled to retroactive pricing of a facility under this Section 3.6.2, such repricing shall be at rates no greater than the lowest rates ***CLEC Acronym TXT could have obtained in the first instance (for the facility to be repriced) had ***CLEC Acronym TXT*** not ordered such facility as UNE]*** [If a dispute pursuant to section 3.6.2.2 above is resolved in Verizon's favor, then ***CLEC Acronym TXT*** shall compensate Verizon for the additional charges that would apply if ***CLEC Acronym TXT*** had ordered the subject facility or service on a month-to-month term under Verizon's interstate special access tariff (except as provided in section 3.6.2.3.1 below as to dark fiber) and any other applicable charges, applicable back to the date of provisioning (including, but not limited to, late payment charges for the unpaid difference between UNE and access tariff rates). The month-to-month rates shall apply until such time as ***CLEC Acronym TXT*** requests disconnection of the subject facility or an alternative term that Verizon offers under its interstate special access tariff for the subject facility or service.]

3.6.2.3.1[In the case of Dark Fiber Transport (there being no analogous service under Verizon's access tariffs), the monthly recurring charges that Verizon may charge, and that ***CLEC Acronym TXT*** shall be obligated to pay, for each circuit shall be the charges for the commercial service that Verizon, in its sole discretion, determines to be analogous to the subject dark fiber facility and, unless otherwise agreed in writing by the Parties, Verizon may disconnect the subject dark fiber facility thirty (30) days after the date on which the dispute is resolved in Verizon's favor. In any case where ***CLEC Acronym TXT***, within thirty (30) days of the date on which the dispute is resolved in Verizon's favor, submits a valid ASR for a "lit" service to replace the subject Dark Fiber Transport facility, Verizon shall continue to provide the Dark Fiber Transport facility at the rates provided for above, but only for the duration of the standard interval for installation of the "lit" service.]

³ This convention is used throughout the proposed amendment as well as in this brief and the CLEC Parties' January 17 brief.

Substitute Part V.C.

C. Pricing If Verizon Prevails in a Dispute — Section 3.6.2.3.

In the event that Verizon prevails in a dispute over the availability of a *TRRO* UNE, the CLEC Parties propose that the price for the facility be set at the lowest price at which the CLEC could have obtained the facility if it had not been ordered as a UNE.⁴ Verizon, by contrast, proposes that the price for facilities other than dark fiber be set at the month-to-month special access rate, retroactive back to the date of provisioning, plus late fees and all other applicable charges. In the case of dark fiber, Verizon proposes that the substitute service be priced at an unspecified level equal to the price of a commercial service that Verizon, in its complete discretion, determines to be analogous to dark fiber.

The Department should adopt the CLEC Parties' proposal and reject Verizon's. The CLEC Parties' proposal is reasonable, while Verizon's is not.

The impairment status of particular wire centers at the ends of any given route is not a yes-or-no proposition at this point in time. The Department specifically declined to undertake a comprehensive review of Verizon's non-impaired wire center list. Instead, the Department stated that it will review the impairment status of wire centers on a case-by-case basis in response to a particular dispute, Arbitration Order at 279-83, and reiterated that decision on reconsideration, Reconsideration Order at 16-17.

The CLEC Parties are not aware that the Department has resolved (or even received) any such dispute. Thus, for any given wire center, there remains a reasonable basis for disagreement over the status of that wire center. Other state Commissions have begun comprehensive reviews

⁴ In the case of a CLEC that has a wholesale special access contract with Verizon, the applicable price under the contract would apply.

of the wire center list, but have not yet come to conclusions. *See, e.g., In re Verizon-Maine: Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21)*, Docket No. 2002-682, Procedural Order (Dec. 7, 2005);⁵ *In re Verizon New Hampshire: Wire Center Investigation*, Docket No. DT 05-083, Order Setting Procedural Schedule, Order No. 24,503 (Aug. 19, 2005).⁶ As a result, Verizon and CLECs in Massachusetts cannot even take guidance from those states as to the validity of Verizon’s methodology in compiling the wire center list and the accuracy of its results. In short, this is still a very grey area.

That being the case, CLECs should not be penalized for ordering UNEs in wire centers of questionable impairment status. If the wire center were clearly non-impaired, CLECs could order special access or other facilities at term or volume discounts. They should have the same benefit if, in good faith, they turn out to be wrong in their assessment of the wire center’s status.

In addition, the Department should reject Verizon’s vague proposal in section 3.6.2.3.1 regarding the price for a dark fiber analogue if Verizon prevails in a dispute. Verizon’s proposal makes it impossible to tell what it will charge. It is unfair and inappropriate for Verizon to request a blank check — especially so given the currently uncertain impairment status of dark fiber routes.

Verizon’s proposal also goes too far in specifying that that substitute price will be that of a “commercial service.” This provision would preclude CLECs from acquiring other services that Verizon might be required to provide, such as dark fiber dedicated transport under § 271 or a future Department mandate under state law. The Department expressly decided that the agreement should not contain provisions that “impede enforcement of any future state-imposed

⁵ Available at http://mpuc.informe.org/easyfile/cache/easyfile_doc170900.DOC.

⁶ Available at <http://www.puc.state.nh.us/Regulatory/Orders/2005orders/24503t.pdf>.

access and interconnection obligations.” July 14 Arbitration Order at 250. Verizon’s proposed provision would do just that. In addition, while the Department has disclaimed authority to require Verizon to provide section 271 UNEs, *see* July 14 Arbitration Order at 250-51, the DTE’s decision does not prevent another agency with jurisdiction, such as the FCC, from mandating § 271 UNEs in Massachusetts. The Department should not shut the door on that possibility.

Further, Verizon is liable to set an outrageous price for its dark fiber substitute. As Conversent has pointed out previously in this proceeding, Verizon elsewhere has suggested a rate of \$1100 per month per mile for the first 20 miles (and \$520 per month per mile for additional miles) for a dark fiber substitute. *See* Conversent’s Response to Verizon’s Motion to Hold This Proceeding in Abeyance, filed May 11, 2004, at 3-4. This rate is *twenty times* the current dark fiber mileage rate of \$49.70 per month per mile.⁷ While Verizon may not be required to price its substitute services at TELRIC, it is still required to charge rates that are just and reasonable. 47 U.S.C. § 201(b); Mass. G.L. C. 159, § 14. It strains credulity for Verizon to suggest that a just and reasonable rate should be twenty times what the Department determined to be the forward-looking cost (plus a reasonable profit) for dark fiber.⁸

⁷ VZ Tariff DTE MA No. 17, Part M, § 2.17.1 (specifying a rate of \$4.97 per 1/10 mile).

⁸ Digging even slightly beneath the surface of Verizon’s proposed rate reveals the fallacious basis on which it was set. Verizon’s \$1100/520 rates are the ring mileage rates for its Intellilight Optical Transport Service (“IOTS”) — a designed, managed, controlled, SONET-based, lit optical transport service. VZ Tariff FCC No. 11, §31.7.21. IOTS is an inappropriate proxy for dedicated dark fiber transport for many reasons, principally because it includes design, management, monitoring, and control services that are not included in the dark fiber offering.

The tariffs for the two services show how different they are. The differences between the services include, but are not limited to, the following: IOTS is a special access-type lit service customized through intricate design, and highly managed, controlled and serviced by Verizon personnel. The customer obtains (at a premium price) a diversely routed ring architecture or topology designed to provide “managed optical transport of multiple protocols.” VZ Tariff FCC No. 11, § 7.2.19(A). Of course, Verizon’s tariffed charges are designed to compensate Verizon for all the services and functions associated with designing, operating and “managing” the various levels of transmission capacity that are offered. Under IOTS, Verizon will make available transmission of at least 15 different protocols, ranging from SONET OC3 through OC48 and Gigabit Ethernet, using specific industry technical specifications. *Id.* § 7.2.19(C)(5). Through IOTS, a customer may connect multiple locations. *Id.* § 7.2.19(B).

Verizon's proposed § 3.6.2.3, and in particular § 3.6.2.3.1, will chill the willingness of competitors to order UNEs in the current environment. Under Verizon's proposal, a CLEC will not be able to predict with certainty the rate that it will pay for high-capacity loops and transport for a significant number of wire centers and routes. This problem is compounded for dark fiber, where a CLEC runs the risk of incurring punitive rates in the event that the CLEC orders dark fiber and then proves to be incorrect in its impairment assessment. To allow Verizon to charge uncertain, possibly extreme rates for dark fiber will discourage CLECs from placing the first dark fiber order in a wire center whose status is unresolved. The dire consequences of an honest but wrong decision will cast a chill over all CLECs' willingness to place dark fiber or other UNE orders. Competition and consumers will suffer as a result.

Verizon engineers will perform the design and configuration requirements to provision IOTS ring and Verizon technicians will construct the ring after it and the customer have mutually agreed upon its design. *Id.*

By contrast, under Verizon's dark fiber offering, the CLEC designs, constructs, configures, and manages its own network. This allows a CLEC to design and manage its network, but requires the CLEC to incur the necessary expense to do so. All that Verizon provides the dark fiber customer is an unlit inert pair of fiber optic strands *on an as-is basis*, between two Verizon central offices, nothing more, nothing less. See VZ Tariff DTE MA No. 17, §§ 17.1.1.A, 17.1.2.A.2, 17.3.1.B. And, since the CLEC must be collocated in both offices, the CLEC must place its own (not Verizon's) electronic equipment on each end of the fiber cable in order to "light" the cable so as to provide the necessary transmission capability. *Id.* §§ 17.1.2.A.2, 17.3.1.E. In addition, Verizon will only provide dark fiber if spare, unused strands are available; it will not construct dark fiber facilities, nor will Verizon introduce additional splice points to accommodate dark fiber requests. *Id.* § 17.1.1.B. Verizon only warrants that the dark fiber was up to specifications at the time it was installed. It does not guarantee that the transmission characteristics of dark fiber will remain constant over time, and takes no responsibility for risks associated with the introduction of future splices on the dark fiber. *Id.* § 17.2.1.C-D. The CLEC is responsible for designing its own system, and must go through a complicated ordering process to acquire dark fiber from Verizon. *Id.* § 17.1.3.

Respectfully submitted,

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